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No. 97-1179

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

RONALD J. TURNER, as Administrator of the Estate of CHARLOTTE M. TURNER, and individually,

Petitioner,

vs.

FALLON COMMUNITY HEALTH PLAN, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR PETITIONER

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The Petitioner has prepared this Reply to Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

I.

On page 1 of Respondent's Brief, Respondent ("Fallon") quotes the Appeals Court in its decision in the case at bar. The thrust of the quotation is that the provisions of the health plan, which is the subject matter of the litigation, did not obligate the health plan to provide the type of treatment required by the Decedent ("Charlotte"). Charlotte required a certain type of bone marrow transplant for solid tumors relating to her breast cancer. The Appeals Court stated that Fallon, under the terms of the health plan, not only had no obligation to provide that type of treatment, but that that type of treatment was specifically excluded from coverage under the terms of the health plan.

The Petitioner had acknowledged that the contract that set forth the health plan initially excluded such bone marrow transplants. *See* Petitioner's Brief, Page 3. However, the health plan had been amended by Fallon to provide for such treatment under a technique or program carried on by Dana Farber, a well known hospital specializing in the treatment of cancer and located in Boston, Massachusetts. The Petitioner stated on Page 3 of his Petition for Writ of Certiorari that Fallon had *further amended* its plan so that such types of treatment by institutions other than Dana Farber would be covered but would be approved on a case by case basis and that a determination of whether or not any such type of treatment at other institutions was suitable to provide treatment for patients like Charlotte would be made by a committee of Fallon personnel.

The Appeals Court never took into account the fact that there was a vote of the appropriate policy and review subcommittee of Fallon on August 23, 1993 which amended

the health plan so that criteria would be established for coverage on an emergency case by case basis to provide treatment at hospitals other than Dana Farber. This change in policy was set forth in a four page document dated August 30, 1993 which was exhibit 2 at the trial and is contained on pages 85 through 88 of the Appendix filed with the Appeals Court. It is clear that the Appeals Court overlooked this document in rendering its decision. Therefore, for appellate purposes, there is every reason to believe that the finding of the Appeals Court that even if remedies for compensatory and punitive damage were allowed, the Petitioner's claim would fail because no "covered benefit" was denied to Charlotte by Fallon, would be quickly overruled by the Supreme Court.

II.

In its Brief, Fallon states that there are no conflicts between the Circuits of Courts of Appeal as to the issues addressed and ruled on by the Appeals Court in the case at bar. Of course no conflict exists. The United States Supreme Court has issued very clear rulings on this subject matter and it is totally inappropriate, if not illegal, for the Circuit Courts or District Courts to rule contrary to explicit decisions of the Supreme Court. It is certainly to be noted that there are cases too numerous to cite in which the Trial Judges and Appellate Judges have articulately stated that the reasoning and rationale of *Massachusetts Mutual Life Insurance Co., et al. v. Russell*, 473 U.S. 134, 87 L. Ed. 2d 96, 105 S. Ct. 2085 (1985) and *Pilot Life Insurance Co. v. Dedeaux*, 48 U.S. 41, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987), and their progeny have led to illogical and irrational decisions; and that the courts are not pleased with this. During oral argument in the case at bar Judge Boudin, the Chief Judge of the three Appellate Judges, stated from the bench that the story of Charlotte and her family was one of the saddest stories that he has ever heard. Furthermore, the Trial Judge in

the case at bar said that he was ruling against the Plaintiff "sadly". As set forth in the Plaintiff's Petition for Writ of Certiorari, Justices Stevens, Scalia and Ginsberg have each expressed dissatisfaction with the present posture of the state of law on the subject matter of the case at bar.

III.

The Respondent, in its Brief, argues that the Appeals Court expressly found that Charlotte had available to her while she was alive a judicial remedy for Fallon's allegedly wrongful denial of coverage and she could have sought judicial relief. However, a review of the decision shows that the Appeals Court stated that although judicial relief is readily frustrated by the exhaustion of remedy rules, the failure to exhaust is easily forgiven for good reason. No evidence was presented at the Trial Court, nor decision made by the Trial Court, nor is it contained in the record, as to whether or not Charlotte, while she was alive, had an opportunity to go into Federal Court or, whether she ought to be held (while desperately ill) to the choice of choosing between continuing with administrative procedures or seeking judicial remedies; or whether she was really responsible for the fact that her health deteriorated markedly and fatally while she was involved in administrative procedures.

CONCLUSION

The case at bar presents an ideal and almost perfect case for the Supreme Court to grant the Writ of Certiorari if the Supreme Court wishes to revisit, as Justice Stevens stated, the issues involved in this case. It would be hard to envision a case that is more perfect on its facts and on the record to use as a vehicle for review of the present law dealing with the subject matter.

Respectfully submitted,

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